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In The

Supreme Court of the United States

October Term, 1984

KERR-McGEE CORPORATION,

Petitioner,

versus

THE NAVAJO TRIBE OF INDIANS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF

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QUESTION PRESENTED

Does federal law condition the effectiveness of tribal tax laws on an affirmative act of approval by the Secretary of the Interior, notwithstanding the Secretary's determination that no such approval is required?

PARTIES

Pursuant to Rule 40.3 of this Court and Rule 25(d) of the Federal Rules of Civil Procedure, the persons listed by Petitioner as the director and members of the Navajo Tax Commission are replaced as respondents herein by their successors, Lawrence White (director), Susan Williams, Stella Saunders, and Nelson Gorman (members), all of whom took office prior to the decision of the Court of Appeals. Although the Navajo Tribe appears in the caption of this case, it and the Navajo Tax Commission were dismissed as parties by the District Court on grounds of sovereign immunity, and the dismissal was not appealed. The action has proceeded as one against the tribal officers for injunctive relief by analogy to the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). N.M. Docket No. 14, Pet. Brief at 9.

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STATEMENT OF THE CASE

The Navajo Tribe of Indians is the largest Indian tribe in the nation, both in land base and population. The United States set apart a reservation for the Navajos by treaty in 1868 (15 Stat. 667), and the reservation has been repeatedly enlarged by executive order and statute. *See* J. Lee Correll & Alfred Dehiya, *Anatomy of the Navajo Indian Reservation* (rev.ed. 1976). Today the Tribe occupies an area of approximately 25,000 square miles (roughly the size of West Virginia), located within the States of Arizona, New Mexico, and Utah. *Id.* The vast majority of this land (including the land which Petitioner Kerr-McGee leases) is held in trust for the Tribe by the United States, although there is also fee land, including land owned in fee simple by the Tribe. *Id.; See* 25 U.S.C. § 635(b). The 1980 Census of the United States shows the population of the Reservation as 95.1% Navajo. The Bureau of Indian Affairs in 1981 estimated that 157,000 Navajos live on the Reservation and in its immediate environs.

The governing body of the Navajo Tribe is the Tribal Council, an 88-member body popularly elected every four years. 2 Nav.Tr.Code § 101 *et seq.;* 11 Nav.Tr.Code § 1 *et seq.* The Tribal Council has existed in much its present form since 1338, with a history extending back considerably earlier. There are about 79,000 registered tribal voters, and of these 69% voted in the last tribal general election in 1982. *See* 1982 Navajo Nation Official Returns, Navajo Election Commission.

Pursuant to its inherent sovereignty and in accordance with the Congressional policy expressed in the Indian

Self-Determination Act, 25 U.S.C. §450a (1975),[1] the Tribe operates a variety of governmental programs. These include a police force, a system of courts, natural resources management and protection agencies, a labor relations agency, health and social welfare programs, a system of public transportation, and an electrical, water, and sewerage utility. These governmental operations are financed in large part with the Tribe's own funds. *See* Navajo Tribal Council Resolution CS-45-84 (establishing 1985 tribal budget). It is not open to question that such programs are of general benefit to all of those living and doing business in Navajo Indian country.

Notwithstanding these tribal programs, however, the level of public services on the Reservation continues to fall far short of what is taken for granted in non-Indian communities. With neither federal nor state programs[2] filling many serious unmet needs, the tribal government must do so,[3] and requires substantial additional revenues to that end. The inadequacy of the electrical distribution grid on the Reservation is such that the tribal utility estimates only 55% of reservation homes to have electricity. The ratio of paved roads to square miles on the reservation is one-third that in the rural areas of the States

[1]i.e., for "an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services."

[2]See F.Cohen, *Handbook of Federal Indian Law*, 646, 676 (1982).

[3]Note in this respect the declared policy of Congress "to help develop and utilize Indian resources, both physical and human, to a point where the Indians will exercise full responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." 25 U.S.C. § 1451.

surrounding the reservation. United States Commission on Civil Rights, *The Navajo Nation: An American Colony* 21 (September 1975). Inadequate domestic sanitation and health care are reflected in a rate of various infectious diseases, some preventable by inoculation, up to fifty times higher than the national average. *Id.* at 118-119. The tribal police department is chronically understaffed and underpaid. *See* Jurisdiction on Indian Reservations: Hearings on S. 1181, *et al.*, Senate Select Committee on Indian Affairs, 96th Cong., 2d Sess. 247-296 (1980). The Tribe hopes by improving these conditions to attract new business to the Reservation, where the 1980 Census found 52,000 persons living below the poverty level.

The Tribe cannot reasonably hope to accomplish these goals, however, without exercising the prerogative of governments everywhere to raise revenues by taxing economic activities within their jurisdictions. The money which the tribal treasury has realized from reservation business ventures, including mineral operations, has in the past been limited to rents and royalties which the Tribe collects in its capacity as landowner. Revenues from the sale of public property do not provide a satisfactory base of support for a government, however, in part because lease terms are unlikely to offer the flexibility in response to changing economic circumstances which is the hallmark of taxation. Numerous mineral leases of Navajo land (including coal, oil, and gas, among others) extend "so long as the minerals are produced in paying quantities," with no adjustment of royalties.[4] Bureau of Competition,

[4]As an example of the consequences, in 1974, with the average value of coal estimated at $15/ton, the Navajo Tribe

(Continued on following page)

Federal Trade Commission, Staff Report on Mineral Leasing on Indian Lands, 34, 83 (1975). Lessees have therefore been able to profit from the rapidly increasing value of the goods and services they sell, in the meantime depleting non-renewable tribal resources, without bearing the parallel increases in the cost of providing government services to them.

In 1978, in order to meet the urgent need for additional governmental funds, the Tribal Council enacted two tax laws. The Possessory Interest Tax, 24 Nav.Tr.Code § 201 *et seq.*, Jt.App. 38 *et seq.*, is measured by the value of leasehold interests in tribal land, not including improvements. The tax rate has been set since 1978 at 3%. 24 Nav.Tr.Code § 201, Jt.App. 43 *et seq.* Because lease-

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was still earning flat royalty rates on various coal leases, ranging from 15¢ to 37½¢/ton. Bureau of Competition, Federal Trade Commission, Staff Report on Mineral Leasing on Indian Lands, 30, 83 (1975). (This situation continues today, with federal surface coal royalties at a minimum of 12.5%. 30 U.S.C. § 207(a).) Power plants operated with Navajo coal have some of the lowest fuel costs in the nation. Compare the fuel cost of 64¢ per million btu's at the Four Corners Generating Station, a power plant operated by *amicus curiae* Arizona Public Service Company, with the national average for coal of $1.64 per million btu's. Energy Information Administration, U.S. Department of Energy, *Cost and Quality of Fuels for Electric Utility Plants*, 100, 120 (1982 Annual). The states of Arizona, New Mexico, and Utah, through their own tax programs, are able in many instances to collect revenues from Navajo mineral producers at a significantly higher rate than does the Tribe. Among New Mexico's many taxes on mineral activities, for example, is a severance tax on coal at 57¢ per ton, substantially more than the Tribe receives under several of its leases. N.M. Stat. Anno. (1978) § 7-26-6. This, despite the fact that the Tribe bears the primary responsibility for governing the Reservation. *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 690 (1965).

hold appraisal techniques take into account not only the income from the use of the land but also the expenses required to produce that income, possessory interest taxes are considered to offer a high degree of tax equity both among mineral-producing properties and as between them and other types of properties. R. Paschall, "A Comparison of Minerals Tax Systems," 12 *Assessors Journal* 221-237 (December 1977).

The Business Activity Tax, 24 Nav.Tr.Code § 401 *et seq.*, Jt.App. 48 *et seq.*, is measured by receipts from the sale of personal property which has been produced or extracted within the Navajo Nation, and from the sale of services within the Navajo Nation. Property produced within the Navajo Nation and then removed before sale is valued as of the time it leaves the jurisdiction. 24 Nav. Tr.Code § 403(2), Jt.App. 53. A standard deduction and various expenses are subtracted to arrive at the net proceeds on which the tax is calculated. 24 Nav.Tr.Code § 406, Jt.App. 55-56. The tax rate has been set since 1978 at 5%. 24 Nav.Tr.Code §401, Jt.App. 56.

Neither law distinguishes between businesses on the basis of whether or not they are Navajo-owned. 24 Nav. Tr.Code §§ 223, 416, Jt.App. 48, 57. Neither is limited to mining operations. Both laws permit appeals from assessments, first to the Navajo Tax Commission, and then to the Navajo Court of Appeals. 24 Nav.Tr.Code §§ 220, 427, Jt.App. 44-45, 60-61.

These two laws, like other Tribal Council resolutions, were submitted to the Bureau of Indian Affairs after passage, in order that they might be classified as to whether they required federal approval, and, if so, further acted upon. The Office of the Solicitor for the Department of

the Interior reviewed the Possessory Interest Tax (the first enacted), and expressly determined that it did not "purport to take any . . . action, which, under federal statute or regulation or under tribal law, is subject to Secretarial approval or disapproval." Memorandum of May 4, 1978; Jt.App. 71. Both taxes were thereafter classified by the Department of the Interior as not requiring Secretarial approval. The Secretary has neither approved nor disapproved either law, and has consistently maintained that the taxes do not require his approval in order to be valid.

Petitioner and others responded to the enactment of the tax laws by suing the Tribe. Petitioner did not seek any administrative review of the Secretary's determination, nor did it raise Secretarial approval as an issue in its original complaint. In 1980, however, after the decision of the Tenth Circuit in *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, *aff'd* 455 U.S. 130 (1982), Petitioner amended its complaint to allege that the Navajo taxes required Secretarial approval. The United States was at that time named as a defendant, but never served with process.

In June 1982, it was decided in the parallel case of *Southland Royalty Co. v. Navajo Tribe*, No. 79-0140 (D. Utah), that the tribal taxes required Secretarial approval to be effective (although the plaintiffs' other challenges were rejected.). The district court in the instant case held the Tribe to be collaterally estopped by the *Southland* decision. Appeals and cross-appeals were taken to the Ninth and Tenth Circuits. On August 22, 1983, the Tenth Circuit held the taxes to be valid without Secretarial approval. *Southland Royalty Company v. Navajo Tribe*, 715 F.2d 486, *petition for rehearing pending*. On April 17, 1984, the Ninth Circuit reached the same conclusion. That

decision, upholding the Navajo taxes at issue,[5] should be affirmed for the reasons set forth below.

SUMMARY OF ARGUMENT

The taxing power of the Navajo Tribe is an attribute of its retained sovereignty, not deriving from the federal government. As such, it is exercised by the Tribe and does not require affirmative federal action to effectuate it. There is nothing in federal law, including the Indian Reorganization Act ("IRA"), 25 U.S.C. §§461-479, and the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§396a-396g, which divests the Navajo taxing power, conditions its exercise on Secretarial approval, or distinguishes it from the taxing power of tribes with IRA constitutions.

The purpose of the Indian Reorganization Act was not to generate distinctions between tribes which did and did not wish to reorganize. It was for tribal rights of self-government to be fully exercised, and not thwarted by the federal bureaucracy as they had been in the past. Because there were many cases where prior federal policies had effectively destroyed tribal government, the IRA constitution was offered as a particular method of rebuild-

[5]On September 20 and October 24, 1984, the Navajo Tribal Council enacted amendments to the two tax laws. Navajo Tribal Council Resolutions CS-47-84 and CO-53-84. (Copies of the amended laws have been lodged with the Clerk.) The changes primarily concern the administration and enforcement of the taxes, and should have no effect on the amount of Petitioner's tax liability. None of the characteristics of the taxes described in the text, *supra*, or by the Ninth Circuit in its decision of this case, has been changed. The amendments did involve the rearrangement and renumbering of many provisions of the laws. Unless otherwise noted, references herein to the tax laws are to the pre-amendment Tribal Code section numbers (with page citations to the Joint Appendix).

ing tribal government. Its purpose was not to shape tribal government or make it more amenable to federal control. Tribes that adopted constitutions under the IRA were in no way required or even encouraged by the Act to condition effectiveness of their laws on approval of the Secretary of the Interior. Furthermore, recognizing that some tribal governments had successfully survived the allotment era, and that some tribes had no need or desire to reorganize under a federal statute, Congress deliberately allowed each tribe the choice of whether or not to accept the IRA. Existing sovereign powers were in no way diminished by any exercise of that option.

Far from being "unorganized," the Navajo Tribe has perhaps the most elaborate governmental organization of any Indian tribe. Its governing Council is elected by the Navajo people and has been repeatedly recognized by the political branches of the federal government, most recently pursuant to the Indian Tribal Governmental Tax Status Act of 1982, 26 U.S.C. §7871. The Tribe's governmental powers, and the power of the Navajo Tribal Council to exercise the Tribe's sovereignty, have also been specifically recognized by this Court. *United States v. Wheeler*, 435 U.S. 313 (1978); *Williams v. Lee*, 358 U.S. 217 (1959).

Whether a tribal ordinance requires Secretarial approval depends on the specific requirements of applicable federal and tribal law. The method by which a tribe organizes is not determinative. A tribe may adopt an IRA constitution that does not condition effectiveness of its laws on the Secretary's action, while a non-IRA tribe may require Secretarial approval through tribal law. In the absence of any provision of either tribal or federal law requiring approval, there is no basis for overturning the

determination of the Secretary that the Navajo tax laws do not require his approval. Congress has plenary power over Indian tribes, but to date it has seen no need either to divest or condition tribal taxing power.

The purpose of the Indian Mineral Leasing Act of 1938 was to enable Indian tribes to lease their lands for mining and to secure "the greatest return from their property." Its focus is on tribal property interests, and it makes no reference to taxation or other tribal governmental matters. Contrary to suggestions that the Act subordinated tribal mineral management to some overriding national scheme, fundamental decisions such as whether or not to lease were left to the tribes, with the Secretary participating only to the extent necessary to protect tribal property interests. The Act makes no relevant distinction between IRA and non-IRA tribes; the "proviso" relied on by Petitioner simply preserves to tribal business corporations chartered under the IRA a power expressly granted therein, to lease lands for not more than ten years, without the need for competitive bidding. Nothing in either the Act or the regulations issued thereunder is inconsistent with or limits the taxing power of the Navajo Tribe.

ARGUMENT

I. The Navajo Taxing Power, as an Attribute of the Tribe's Retained Sovereignty Which Does Not Derive from the Federal Government, May Be Exercised Without Secretarial Approval.

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court sustained the power of Indian tribes to impose taxes, within their territorial jurisdiction,

as an element of their inherent sovereignty. The Court held that "The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." 455 U.S. at 137. As such it derives from a tribe's retained sovereignty and not from any federal grant of power. "Neither the Tribe's Constitution nor the Federal Constitution is the font of any sovereign power of the Indian tribe." 455 U.S. at 149, n.14.

Tribal taxing power, like other sovereign powers, remains intact unless divested by the federal government. This Court has declined to find divestiture of tribal powers in the absence of "clear indications" that Congress intended such a result. 455 U.S. at 149 & n.14, 152, 159. The Court in *Merrion* relied on the "widely held understanding within the federal government that federal law to date has not worked a divestiture of Indian taxing power." 455 U.S. at 159, quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980). *See also Montana v. United States*, 540 U.S. 544, 565 (1981); *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Barta v. Oglala Sioux*, 259 F.2d 553 (8th Cir. 1958); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dism'd*, 203 U.S. 599 (1906). The Court further rejected the suggestion that tribal taxation was inconsistent with overriding national interests. *Merrion*, 455 U.S. at 147, n.13, citing *Colville, supra*.

Holding that the Jicarilla Apache Tribe could "enforce its severance tax unless and until Congress divests this power," *Merrion*, 455 U.S. at 159, the Court admonished that "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear

indications of legislative intent." 455 U.S. at 149, quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). Any doubt about Congressional intent is to be resolved in favor of the tribe, as "[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Merrion*, 455 U.S. at 152, quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-144 (1980).

The Court has recently relied on the decision in *Merrion*, saying, "We have stressed that Congress' objective of furthering tribal self-government encompasses more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'" *New Mexico v. Mescalero Apache Tribe*, — U.S. —, 76 L.Ed.2d 611, 621, 103 S.Ct. 2378 (1983).

Petitioner attempts to avoid the application of the rule of *Merrion* to the Navajo Tribe by focusing exclusively on the particular structure of the Jicarilla Apache tribal government. Because the Jicarilla taxes were approved by the Secretary of the Interior, Petitioner claims that no tribal tax law can be valid without such approval—and that not even the Secretary's own determination to the contrary will suffice. Petitioner ignores the fact that the need for Secretarial approval in *Merrion* arose from the provisions of *tribal* law. The Court plainly identified a specific article of the Jicarilla Constitution as the source of the requirement. 455 U.S. at 155. Navajo law contains no such provision.

The *Merrion* decision does not support the notion that *federal* law requires tribal taxes to be approved by the

Secretary in order to be effective. Such an argument is fundamentally inconsistent with *Merrion's* holding that the taxing power is an aspect of retained tribal sovereignty not deriving from the federal government. Tribal powers are exercised by the tribe. To condition every exercise of tribal taxing power on Secretarial approval would be to diminish tribal sovereignty. Congress could impose such a limitation, but it has never done so.

II. The Sovereign Powers of the Navajo Tribe Were Not Diminished by its Decision Not to Reorganize Under the Indian Reorganization Act.

In *Williams v. Lee*, 358 U.S. 217 (1959), this Court reviewed Congressional policies towards Indians, including the encouragement in the Indian Reorganization Act of "stronger and more highly organized" tribal governments. It then said: "No departure from the policies which have been applied to other Indians is apparent in the relationship between the United States and the Navajos." 358 U.S. at 220-221. There is no merit whatever to the suggestion that because the Navajo Tribe chose fifty years ago not to reorganize under the IRA, Congress disfavors its exercise of the powers of self-government.

The Indian Reorganization Act ("IRA"), 25 U.S.C. §§471-479, represented a repudiation of the policies effected by the General Allotment Act of 1887, 25 U.S.C. §331 *et seq.* The consequences of the allotment era, an almost devastating loss of land and autonomy by various Indian tribes, were described by the House sponsor of the IRA as "a scandal and a blot on our name in every part of the world." 78 Cong.Rec. 11727 (1934). Congress enacted the IRA to

remedy these past wrongs, and not to disable further any tribal government.

One of the specific evils of the allotment era was that federal policies had in many (though by no means all) cases "destroyed [the Indian's] own political and civic institutions," and brought on "the disintegration of his tribal and clan organizations." 78 Cong.Rec. 11729 (1934). Associated with the decline of many Indian governments was the ascendancy of the Bureau of Indian Affairs, exercising "almost unlimited" powers over "the property, the persons, the daily lives and affairs of the Indians." *Id.* Tribal monies were spent and tribal property disposed of without the consent of the Indians involved. 78 Cong.Rec. 11731 (1934).

In response to this situation, Congress in the IRA stated a federal policy in favor of tribal self-government.[6] It provided that a tribe "shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws. . . ." 25 U.S.C. §476. As the use of the word "may" signifies, the adoption of a constitution in the manner authorized by the Act was never considered to be the only effective means of tribal organization. Congress specifically recognized that Indian tribes could, and had, organized outside the framework of any federal statute, it being said in the debates over the bill that some tribes, particularly in the western states, still retained a functioning government. 78 Cong.Rec. 11739 (1934). The Navajos had a Tribal Council prior to the enactment of the

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[6]The IRA also addressed matters other than the reorganization of tribal governments, for example putting an end to allotment of tribal lands and offering financial benefits to tribes. 25 U.S.C. §§ 461, 469-471.

IRA, and were classified by the Interior Department as already having a "constitution or documents in the nature of a constitution." F. Cohen, *Handbook of Federal Indian Law,* 129 n.59 (1942). They were not therefore in need of the provisions of the IRA designed to allow the rebuilding of atrophied tribal governments.

Those tribes that did reorganize under the IRA did not acquire new sovereign powers. (Only a few specific powers, not here relevant, were enumerated in the Act.) The vast majority of powers which could be vested in a tribe or its council by an IRA constitution were simply described as "all powers vested in any Indian tribe or tribal council by existing law." 25 U.S.C. §476. Felix Cohen in his classic treatise on Indian law said about the IRA that it "had little or no effect upon the substantive powers of tribal self-government vested in the various Indian tribes," although "[u]ndoubtedly, the act had some effect upon the attitude of the administrative agencies towards powers which had been theoretically vested in Indian tribes but frequently ignored in practice."[7] F. Cohen, *Handbook of Federal Indian Law,* 129-130 & n.62 (1942).

The decision of this Court in *Merrion* stands for the proposition that one of those powers which preexisted the IRA, as opposed to having been created by tribal constitutions, is the taxing power. *See also Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 153 (1980) (involving tribes which had voted not to come under the IRA; *see* n.10, *infra*). Indeed, this was the understanding from the time the IRA was

[7]Even in the complete absence of the IRA the bureaucratic excesses Congress decried were no doubt in many cases unlawful. See Powers of Indian Tribes, 55 I.D. 14, 28 (1934).

enacted and the Solicitor of the Interior Department was asked to identify the powers under "existing law" referred to in the statute. Powers of Indian Tribes, 55 I.D. 14, 46 (1934). The Navajo Tribe possessed the taxing power before the IRA became law, and it continues to possess it today.

Congress gave tribes the option of excluding themselves from the IRA[8] specifically because of its respect for tribal rights of self-determination. It deliberately abandoned an earlier mandatory version of the Act, 78 Cong. Rec. 12164 (1934),[9] and provided for elections to be held within a year (later extended to two), at which tribes could vote against its application to their reservations. 25 U.S.C. § 478. An amendment to the law in 1935 reaf-

[8]Although 25 U.S.C. § 478 speaks broadly of tribes voting against application of "this Act," it should be noted that various portions of the IRA have been held universally applicable, regardless of the outcome of local elections. *See, e.g., Mancari v. Morton,* 359 F.Supp. 585, 588 (D.N.M. 1973), *rev'd on other grounds,* 417 U.S. 535 (1974).

[9]The briefs of Petitioner and its supporting amici are replete with citations to the "legislative history" of the IRA which in fact had reference to earlier drafts of the law. See 78 Cong. Rec. 9269, 11738 (1934). This includes S.Rep. 1080, 73d Cong., 2d Sess. (May 10, 1934; Pet.Brief at 24); the remarks of Commissioner Collier on H.R. 7902 before the House Committee on Indian Affairs (February 22, 1934; Pet.Brief at 23); and the remarks of Commissioner Collier and others to the Navajo Tribal Council in March and April of 1934 (Pet. Brief at 27-29). The opposition of Indian tribes—particularly those which already had governmental organizations—to the original BIA-drafted bill which had been presented to them around the country led to extensive redrafting, to the end that "everything in this bill is optional with the Indians whereas in the original bill everything was mandatory." 78 Cong.Rec. 12164 (1934).

The BIA approach to tribal government that gave rise to the need for the IRA in the first place should also serve as a warning against taking on faith the assertions of individual BIA officials about how little power the tribes had and how much power they had.

firmed that all other laws and treaties of the United States continued in effect as to tribes voting against application of the Act. 25 U.S.C. § 478b.

Thus the purpose, the language, and the history of the IRA are all inimical to the suggestion that tribes which had managed to retain their political integrity through the allotment era, or indeed any tribes, risked diminishment of governmental powers if they chose not to *re*organize under the Act. It was repeatedly stated during the debates on the Act that the bill would leave "altogether undisturbed" those tribes not wishing to come within it; and that tribes would be "unaffected by the bill if they choose not to be affected by it." 78 Cong.Rec. 11124.

The tribes which had the least need to reorganize under the IRA were precisely those, like the Navajo, which had best managed to retain their political integrity prior to its enactment. Contemporary reports indicate that a factor in the Navajo rejection of the IRA was the belief of tribal members that their 1868 treaty with the federal government already provided ample protection for their right of self-government. L. Kelly, *The Navajo Indians and Federal Indian Policy,* 1930-1935, 167, 169-170 (1970), citing the *Albuquerque Journal,* June 17, 1935, p.8 and June 24, 1935, p.6. In this belief they have been repeatedly proven correct. *E.g. McClanahan v. Arizona Tax Commission,* 411 U.S. 164 (1973); *Williams v. Lee,* 358 U.S. 217 (1959). (The Jicarilla Apaches, by contrast, did not have a treaty.) Other tribes rejecting the IRA did so on similar bases. J. Garry, "The Indian Reorganization Act and the Withdrawal Program," in *Indian Affairs and the Indian Reorganization Act: the Twenty Year Record* (W. Kelly, ed. 1954).

Contrary to Petitioner's assumption, there is nothing inherently "better"—or even different—about the governmental organizations of tribes accepting the IRA, such as would support a federal policy favoring the exercise of sovereign powers by those tribes. A tribe accepting the IRA was not required to adopt a written constitution at all, and many did not do so.[10] *E.g.,* Zuni Tribe; *see* T. Haas, United States Indian Service, *Ten Years of Tribal Government Under I.R.A.* 18, 30 (1947) (hereinafter *"Ten Years Under IRA"*), G.Fay, ed., *Charters, Constitutions, and Bylaws of the Indian Tribes of North America* (1967), pt. IV p. 112 (hereinafter "IV Fay 112"). (Indeed, all that was required in order to "accept" the IRA was to fail effectively to opt out—for example, because no one showed up at the election or the tribe refused to hold one. *Ten Years Under IRA* 3, 14-15.) If a tribe did adopt a constitution, there was nothing in the IRA by which Congress required it or even encouraged it to condition its laws on Secretarial approval. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 66 (1978) (recognizing Santa Clara constitution not to require Secretarial approval of ordinances). There are IRA constitutions specifically vesting in tribal organs the power to tax without any Secretarial approval requirement. Constitution of Pueblo of Laguna (1984 constitution expressly au-

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[10]There are also many non-IRA tribes which *have* adopted written constitutions—either before or after the passage of the IRA. *Ten Years Under IRA* 34. This includes the Lummi and Colville Tribes, two of the tribes whose taxes were upheld in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 143 n.11, 152-154.

thorizing taxation of non-members; 1954 constitution, IV Fay 73, authorizing taxation without limitation to members); Constitution of San Carlos Apache Tribe, III Fay 36 (1954) (taxing power not limited to members). An IRA constitution need not specifically enumerate the powers vested in tribal organs at all. Constitution of Isleta Pueblo, V Fay 70 (1947). And nothing in the IRA required tribal constitutions to contain a bill of rights, to provide for separation of powers, or to organize the government into any particular form.[11]

In a few instances the IRA enumerated powers that could be vested in tribal organs through IRA constitutions, and which were designed to discourage the kind of control the BIA had been exercising over various tribes. For example, a tribe adopting a constitution was expressly enabled to "prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." 25 U.S.C. § 476. Yet even powers such as this last were not limited by Congress to IRA tribes. The IRA represented first and foremost a dramatic shift in federal policy, which the federal government has since pursued as to all tribes. Four years after the IRA, in the Indian Mineral Leasing Act of 1938, Congress confirmed in *all* tribes one of the specifically enumerated powers in the IRA, providing that

[11]Congress has addressed individual rights vis-a-vis tribal government more recently in the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.* (1968), which applies to all tribes, with or without IRA constitutions. The Navajo Tribal Council had previously adopted its own Bill of Rights. 1 Nav.Tr.Code § 1 *et seq.*

tribal lands could not be leased for mining purposes without the consent of a tribe.[12]

Subsequent legislation has reaffirmed Congressional support for tribal self-government in terms that do not distinguish between IRA and non-IRA tribes. Policy statements such as those in the Indian Self-Determination Act of 1975 and the Indian Financing Act of 1974 (see nn. 1 & 3, *supra*) apply to all tribes, without the slightest suggestion that Congress considers tribes which rejected the IRA permanently disabled from exercising powers of self-determination. (*See also* H.R.Rep. 91-78, 91st Cong., 1st Sess. (1969), documenting how an Interior Department proposal to treat IRA and non-IRA tribes differently with respect to the granting of rights-of-way was abandoned because of strong objections from a Congressional committee.) As the majority of Indians and the majority of Indian lands belong to tribes which did not accept the IRA, and as most federally-recognized Indian groups have not reorganized under any Act of Congress, the exclusion of

[12]In 1950, in the Navajo-Hopi Rehabilitation Act, 25 U.S.C. § 631 *et seq.*, Congress further confirmed in the Navajo Tribal Council in particular not only the right mentioned in the IRA to *prevent* the disposition of tribal assets, but also the power to *determine* the use of tribal funds, subject to Secretarial approval. 25 U.S.C. § 637. Notwithstanding that the Navajo Tribe had not accepted the IRA, Congress in the Rehabilitation Act repeatedly recognized the authority of the Navajo Tribal Council over the Tribe's affairs. That Act again authorized the Navajo Tribe "to adopt a tribal constitution in the manner herein prescribed," but it did not require it to do so, and the legislative history indicates only a desire "to accord the Navajos the widest practicable choice in determining the framework of their tribal government." H.R.Rep. 81-1474, 81st Cong., 2d Sess. (1950). Like the IRA constitutions, this one might vest in the Navajo Tribe "any powers vested in the tribe or any organ thereof by existing law"—a clear indication that Congress did not consider the Tribe's existing powers to have been destroyed by its earlier decision not to reorganize under the IRA.

such tribes would leave an enormous gap in these policies. H.R.Rep. 91-78, 91st Cong., 1st Sess. at 3, 5 (1969).

The plain language of the IRA, as well as the intentions of Congress reflected in its legislative history and in more recent enactments, defeats any suggestion that a Tribe exercising the option offered it by Congress suffered diminishment of its governmental powers. The Navajo taxing power pre-existed the IRA and has remained intact until the present time, in no way limited by a law from whose application the Tribe excluded itself at the invitation of Congress.

III. The Navajo Tribe Is an Organized Tribe Whose Sovereign Powers Are Exercised Through Its Tribal Council.

Petitioner's contention that the Navajo Tribe is "unorganized" and that the Navajo Tribal Council therefore lacks the independent sovereign authority necessary to enact effective tax legislation is irreconcilable with both federal and tribal law, as reflected in the actions of all branches of the federal government and of the Navajo people.

In *Williams v. Lee,* 358 U.S. 217, 221-222 (1959) this Court considered the treaty of 1868 with the Navajos, and found implicit in it "the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." *Williams,* significantly, concerned the activities of a non-Indian within the Navajo Reservation. The Court went on to say: "The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it." *Id.* at 223.

Congress has not taken this power away from the Navajo Tribe. The federal government has instead consistently recognized the Tribe's right to govern the reservation through the Navajo Tribal Council. In the Indian Tribal Governmental Tax Status Act of 1982, 26 U.S.C. §§ 7871(a) (3), Congress provided that taxes imposed by Indian tribal governments might, like state taxes, be deducted for federal income tax purposes. Congress directed the Internal Revenue Service, in consultation with the Interior Department, to develop a list of Indian tribal governments eligible under the Act. The list includes the Navajo Tribal Council. Rev. Proc. 83-87, Dec. 12, 1983, 1983-50 I.R.B. 8. Also recognizing the power of the Navajo Tribal Council in particular to levy taxes is 25 C.F.R. § 141.11.

These are two of many expressions of federal recognition of the Navajo Tribal Council as the government of the Navajo Tribe. *See* Department of the Interior, *Governing Bodies of Federally Recognized Indian Groups* 14 (1975). In providing for Navajo participation in various decisions or actions, Congress has often specified the Council as the body through which that participation will occur. 25 U.S.C. §§ 635(b), 637, 638; 16 U.S.C. § 445; Pub. L. 93-351, Act of Dec. 22, 1974, 88 Stat. 1712; Pub. L. 93-493, Act of October 27, 1974, 88 Stat. 1486; Pub. L. 85-868, Act of Sept. 2, 1958, 72 Stat. 1686-1690. *See also* S.Rep. 93-1177, 93rd Cong., 2d Sess. at 12 (1974).

Petitioner is alone in its belief that the Navajo Tribe is "unorganized." The Navajos have been said to have "perhaps the most elaborate governmental organization"

among tribes. H.R.Rep. 91-78, 91st Cong., 1st Sess. 8 (1969). And the Secretary has been at some pains to point out that the term "unorganized" is only "applied to groups which are without any form of organization recognized by this Department . . . . We recognize many tribal organizations established outside of the provisions of [the Indian Reorganization Act and the Oklahoma Indian Welfare Act]." *Id.* at 40. The Navajo Tribal Council is one of these. *Id.* at 48.

Petitioner now suggests that the involvement of the Secretary of the Interior in the organization of the Navajo Tribal Council somehow limited the Council's ability to exercise the Tribe's sovereign powers. Petitioner has not previously made this argument, having obtained its leases from the Navajo Tribal Council, and stated in its complaint in this case that the Council was "the governing body of the Tribe." First Amended Complaint ¶ 4, Jt. App. at 6. The argument also contradicts Petitioner's claim that the involvement of the federal government in the organization of IRA tribes particularly favors *their* exercise of the taxing power.

Petitioner errs in assuming that because the federal government was involved in establishing the *procedural* mechanisms by which the members of the Navajo Tribe elect their representatives, the *substantive* powers of the Council derive from the federal government as well. Although the Secretary did facilitate the organization of the Tribal Council through procedural regulations, he never purported to dictate or even to enumerate the Council's substantive powers. The 1938 "Rules for the Navajo Tribal Council" simply specified that "The Tribal Council shall be the governing body of the Tribe," and that resolutions of

the Council should be signed or countersigned by the Chairman or Vice-Chairman of the Council, with no mention of approval by the Secretary. Rules for the Navajo Tribal Council, Ch. 1, § 1, Ch. VI § 6, reproduced in R. Young, *The Navajo Yearbook* 407-411 (1961).[13]

An approach very similar to Petitioner's was expressly rejected by this Court in *United States v. Wheeler,* 435 U.S. 313, 328 (1978), when it said "That Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power." The *Wheeler* case is of particular interest here, because the Court specifically recognized that the Tribal Code and the tribal courts created by the Navajo Tribal Council are manifestations of the separate and original sovereignty of the Navajo Tribe, and not that of the United States. *Id.* at 327 & n. 5. The argument that the Navajo Tribal Council derives its powers from the Secretary would require reversal of this Court's holding in *Wheeler* that prosecution in federal and Navajo courts did not constitute forbidden double jeopardy. *See also Williams v. Lee, supra; Oliver v. Udall,* 306 F.2d 819 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 908 (1963).

The Navajo Tribal Council derives its powers from the Navajo people who go to the polls every four years to elect

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[13]These regulations were a product of meetings of Interior Department officials with the "constitutional assembly" referred to in the resolution which is Exhibit A to Petitioner's Brief. *See* 1954 Navajo Tribal Council Resolutions at 190; R.Young, *The Navajo Yearbook* 381-382 (1961); S.Rep. 93-1177, 93d Cong., 2d Sess. (1974). As since amended, they are part of the Navajo Tribal Code. 2 Nav.Tr.Code § 101 *et seq.*; 11 Nav.Tr.Code § 1 *et seq.* This may be considered the organic or "constitutional" law of the Tribe in the sense of "the written organizational framework of any tribe for the exercise of governmental powers." 25 C.F.R. § 82.1(e). *See* T.Haas, United States Indian Service, *Ten Years of Tribal Government Under* IRA 34 (1947).

"the governing body of the Tribe." *The Navajo Yearbook* at 386, 407; M. Shepardson, "Navajo Ways in Government: A Study in Political Process," 65 *American Anthropologist*, No. 3, Part 2, at 63, 106 *et seq.* (June 1963). It has never been the case that any people (not to mention one whose native language is unwritten) may establish a government only by voting to adopt a written constitution. *See Iron Crow v. Oglala Sioux,* 231 F.2d 89, 92 (8th Cir. 1956). Nor is there anything remarkable about the fact that the scope of matters as to which the Council has legislated has broadened over the years. The Navajo Tribe has been encouraged in precisely that direction by the federal government over the past half-century. "Congress and the Bureau of Indian Affairs have assisted in strengthening the Navajo tribal government and its courts." *Williams v. Lee,* 358 U.S. 217, 221 (1959). Whereas the Tribe was once served by federal police, federal courts, and federal schools, it now has tribal police, tribal courts, and even tribal schools—all of which necessitates Council action of a different kind than what was called for in the 1930's. Without tax revenues, however, this trend cannot long continue.

It has been said that "the first element of sovereignty" is "the power of the tribe to determine and define its own form of government." Powers of Indian Tribes, 55 I.D. 14, 30 (1934); F.Cohen, *Federal Indian Law* 126 (1942). The legitimacy of the Navajo Tribal Council being recognized both by the Navajo people and by the United States, it is not at all clear what justiciable question of federal law Petitioner believes its organizational history to present. *See United States v. Holliday,* 70 U.S. 407, 419 (1866). The manner in which the Navajo Tribe

vested its powers in the Navajo Tribal Council could not possibly alter the fact that *federal* law has never divested the Tribe of its taxing power nor conditioned its exercise on Secretarial approval.

IV. There Is No Law Requiring Secretarial Approval of The Navajo Taxes.

Whether a tribal ordinance requires Secretarial approval is determined by the specific requirements of applicable federal and tribal law. In contending that all tribal tax laws require Secretarial approval, Petitioner is arguing for a limitation on tribal sovereignty which Congress has never imposed and which the Secretary himself has rejected. Petitioner apparently believes this approval requirement derives from the Indian Reorganization Act, proceeding on the assumption that if a tribe adopts an IRA constitution its laws require Secretarial approval. This is incorrect. As noted above, pp. 17-18, there is nothing in the IRA requiring tribal constitutions to condition tribal ordinances on Secretarial approval. There are IRA constitutions vesting powers, including the power to tax non-Indians, in tribal organs, without any such requirement. *Id.*

Whether a tribe with an IRA constitution does or does not condition its powers on Secretarial approval is thus a question of *tribal* law. Similarly, a tribe without an IRA constitution may condition its taxes or other laws on Secretarial approval by including such a requirement in the ordinance in question or other tribal law. But neither the IRA nor any other *federal* law conditions tribal taxing power on Secretarial approval.

There are, of course, certain kinds of tribal actions which Congress *has* expressly required to be approved by

the Secretary. This is almost always the case where a tribe is disposing of or conveying tribal property interests. *See e.g.* 25 U.S.C. §§ 177, 323, 635. Petitioner's continual citation of such statutes and of the cases enforcing them, however, serves only to point up the fact that there is no general rule requiring Secretarial approval of all tribal actions, and that when Congress has intended such a requirement it has said so. "Where Congress has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power." *Alco Steamship Company v. Federal Maritime Commission*, 348 F.2d 756, 758 (D.C.Cir. 1965).

When Congress inquired into civil rights in Indian country, an inquiry culminating in the passage of the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.* (1968), the investigating committee reported that it "had failed to uncover any Federal statute which specifically requires Secretarial approval of tribal ordinances." Constitutional Rights of the American Indian: Summary Report of Hearings and Investigations by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, pursuant to S.Res. 265, 88th Cong., 2d Sess., at 3 (1964). The subcommittee further found that broad approval requirements in tribal constitutions "frustrate responsible self-government." *Id.* If Congress had believed Secretarial approval to be necessary in order to ensure the rights of those within Indian country, it obviously could have legislated to that effect in the Civil Rights Act. It did not take that course.

Nor did this Court's opinion in *Merrion* indicate the existence of any federal approval requirement for tribal tax laws. The Court specifically identified the constitu-

tion of the Jicarilla Apache Tribe as the source of the requirement for Secretarial approval.[14] 455 U.S. at 155. Although Secretarial approval may be *one* of the factors which can "minimize potential concerns" about unprincipled tribal taxes, 455 U.S. at 155, it is not the only one identified by the Court. Congress retains the ability to limit the taxing power of *any* tribe, the Navajos included. The Tribe is also constrained by its own economic self-interest and by the involvement of the Secretary in numerous other aspects of Navajo government (for example, in approving the expenditure of tribal funds, and in determining in the first instance whether a tribal action does or does not require his approval).

The Secretary's own long-standing position is that there is no general requirement for approval of tribal ordinances, but only specific requirements arising out of federal law, the tribal constitution, or other tribal law. In 1959 the Assistant Solicitor determined Navajo Tribal Council resolutions concerning labor policy not to require Secretarial approval, saying:

> It has been emphasized that "Indians are not wards of the Executive officers, but wards of the

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[14]The language Petitioner quotes from *Merrion* about federal "checkpoints" is part of this Court's analysis of the Commerce Clause issue there. 455 U.S. at 145. The existence of such checkpoints was revelant because it obviated the need for additional analysis by the Court under the dormant Commerce Clause. *Id.* The absence of federal checkpoints might have altered the Commerce Clause analysis (although this Court went on to hold that the tax at issue would not infringe the dormant Commerce Clause in any case), but that provides no support for the argument that, independent of any Commerce Clause question, a tribal tax must pass through federal checkpoints to be valid. Here there is no Commerce Clause issue presented.

> United States." [Citations omitted.] Congress has not required the Secretary to approve tribal ordinances, nor has the President or the Secretary, under authority delegated by Section 2 of 25 U.S.C., seen fit to issue regulations referring to Secretarial consideration or approval of tribal ordinances.

Memorandum, June 6, 1959, Jt.App. at 67. The Bureau of Indian Affairs Manual takes a consistent position. It states that tribal ordinances are adopted by the vote of tribal governing bodies, that they do not require Secretarial approval except when federal or tribal law so provides, and that "Such action should be minimal in view of the policy of self-determination." 83 B.I.A. Manual 6.6B.

The Secretary has recently issued "Guidelines for the Review of Tribal Ordinances Imposing Taxes on Mineral Activities." January, 1983. *See* Appendix to this Brief. One purpose of these guidelines is "to assist Indian tribes in the exercise of their inherent authority to tax mineral activities within their jurisdiction." Guidelines, §1.1(A) (2). The guidelines recognize the power of tribes both with and without written constitutions to tax, so long as the constitution or other documents creating a tribal governing body do not limit it to enumerated powers not including taxation, or otherwise specifically preclude taxation. §1.6(b) (2). The *only* substantive reasons for which taxes subject to the guidelines may be disapproved are violations of federal or tribal law, or failure to provide for a hearing on contested taxes. §1.6B. The Navajo taxes meet the standards of these guidelines. 24 Nav.Tr.Code §§220, 427, Jt.App. 44-45, 60-61. The guidelines do not however apply of their own force to the Navajo taxes, because the Secretary has limited their scope, consistent with his position in this litigation, to cases "where Secretarial review or approval is expressly required under federal law, the constitution of the tribe, the ordinance itself, or other tribal law." §1.1B. As noted previously, the Navajo tax laws were submitted to the Interior Department in 1978, and specifically determined by it not to require approval.

There is no single law determining which tribal ordinances require Secretarial approval. The matter is determined by the Secretary in light of the laws applicable to each particular case. It would create enormous practical difficulties in governance if the determination of a tribe's own trustee that a tribal action does not require approval were liable to be overturned years later at the instance of a non-party to the trust relationship. It would also be inconsistent with the deference normally due to an agency's own interpretation of the duties committed to it by law. *Immigration and Naturalization Service v. Stanisic,* 395 U.S. 62, 72 (1969); *Udall v. Tallman,* 380 U.S. 1, 16 (1965). The courts have previously respected the Secretary's determination as to where tribal action does and does not require his approval. *Babbitt Ford v. Navajo Tribe,* 710 F.2d 587 (9th Cir. 1984), *cert. denied* — U.S. —, 104 S.Ct. 1707 (1984) (Navajo ordinance regulating repossession of personal property on reservation held not to require Secretarial approval); *Knight v. Shoshone & Arapahoe Indian Tribes,* 670 F.2d 900 (10th Cir. 1982) (tribal zon-

ing ordinance held not to require Secretarial approval); *Conoco v. Shoshone & Arapahoe Tribes,* 569 F.Supp. 801 (D. Mont. 1983), *appeal pending* (10th Cir.) (decision same as Ninth and Tenth Circuit holdings in instant case); *State v. District Court,* 609 P.2d 290 (Mont. 1980). *Cf. Yavapai-Prescott Indian Tribe v. Watt,* 707 F.2d 1072 (9th Cir. 1983), *cert. denied* — U.S. —, 78 L.Ed.2d 723 (1983) (tribe held unable to terminate lease without Secretarial approval *because* of existence of applicable regulations on the subject and position of Secretary that his approval was required; Petitioner's reliance on this case is therefore misplaced).

Neither the Navajo Tribe nor any other tribe is outside of federal control. Congress has ample power to deal with any threat particular tribal taxes might pose to national interests. Petitioner, however, continually confuses the existence of federal *power* over Indian tribes with a requirement that such power must be exercised in every case to effectuate tribal action. To insist on Secretarial approval in the circumstances of this case, particularly when the Secretary himself has determined it to be unnecessary, is to insist on a great deal more than federal oversight of tribal action. It is instead to take the position that the exercise of the tribal taxing power somehow requires an affirmative exercise of federal as well as tribal sovereignty. This is inconsistent with what has been described as "perhaps the most basic principle of Indian law," and recognized by this Court in numerous cases including *Merrion:* "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent

powers of a limited sovereignty which has never been extinguished." Felix Cohen, *Handbook of Federal Indian Law* 122 (1942). *See also United States v. Wheeler, supra; Williams v. Lee, supra.*

V. The Indian Mineral Leasing Act of 1938 Does Not Divest or Limit the Taxing Power of Indian Tribes.

A. The Indian Mineral Leasing Act does not distinguish in any relevant way between IRA and non-IRA tribes.

In *Merrion* this Court rejected arguments that the 1938 Indian Mineral Leasing Act, 25 U.S.C. §§396a-396g, divested the taxing power of the Jicarilla Apache Tribe. *Id.* Now Petitioner suggests that this same Act, which contains no reference to taxation, *does* limit the taxing power of the Navajo Tribe. It attempts to reconcile this argument with *Merrion* by claiming that the Act *distinguishes* between the taxing power of IRA and non-IRA tribes. This argument, allegedly based on the "proviso" in Section 2 of the 1938 Act (25 U.S.C. §396b), is wholly untenable on the face of the Act.[15] The holding in *Merrion* that the 1938 Act did not divest tribal taxing power therefore applies to the Navajos as well as to the Jicarcillas.

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[15]Section 1 of the 1938 Act (25 U.S.C. § 396a) provides that tribal lands may be leased, by authority of the tribal council or other tribal spokesman, and with the approval of the Secretary, for ten years and so long thereafter as minerals are produced in paying quantities. Section 2 (25 U.S.C. § 396b) sets out the procedures whereby leases shall be offered for sale, with the involvement of the Secretary in various respects, and includes the proviso relied on by Petitioner:

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The portion of the 1938 Act from which Petitioner claims the diminishment of taxing power arises is Section 4 (25 U.S.C. §396d), which authorizes Secretarial regulation of lease operations. Petitioner's attempt to distinguish two classes of tribes is completely undermined, however, by the fact that Section 4 makes no distinction between IRA and non-IRA tribes. It *expressly* applies not only to leases made under the 1938 Act, but also to leases made pursuant to the terms of *any other Act affecting restricted Indian lands.* Leases made pursuant to a tribe's IRA constitution and charter, therefore, are covered by the Secretary's authority in Section 4 to regulate operations under leases once made. Petitioner's claim that Section 4 precludes tribal taxation, but that IRA tribes are excluded from its coverage, fails.

What the proviso in Section 2 refers to is something else entirely. It provides that the "foregoing"—namely the provisions for Secretarial involvement and competitive bidding in the *making* of a lease—shall not restrict the

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> *Provided,* That the *foregoing* provisions shall in no manner restrict the right of tribes organized *and* incorporated under sections 16 *and* 17 of the Act of June 18, 1934 (48 Stat. 984), to *lease* land for mining purposes *as therein provided* and in accordance with the provisions of any constitution *and* charter adopted by any Indian tribe pursuant to the Act of June 18, 1934.

(Emphasis added.)

Section 4 of the Act (25 U.S.C. § 396d) provides in relevant part:

> That all operations under any oil, gas, or other mineral lease issued pursuant to the terms of this *or any other Act* affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior.

(Emphasis added.)

rights of tribes both organized *and* incorporated under §§ 16 and 17 of the IRA (25 U.S.C. §§ 476 and 477) to *lease* lands as therein provided.

The focus of the proviso is not on whether a tribe has adopted a constitutional form of government under § 16, but on whether it has further opted to create a business corporation to manage tribal property under § 17. (One does not necessarily follow from the other. 25 U.S.C. §§ 476, 377; T. Haas, United States Indian Service, *Ten Years of Tribal Government Under I.R.A.,* 1947.) Nor does the proviso purport to create any *new* rights in such tribal corporations; it preserves only the right to lease land for mining purposes *as provided in* Sections 16 and 17 of the IRA.

Section 16 of the IRA mentions the right to *prevent* disposition of tribal land—a right extended to all tribes with respect to mineral leases in the 1938 Act. Section 17, however, provides that a corporation chartered under that section may be empowered to lease tribal lands, but that "no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation."

This, then, is the power reserved to tribal corporations by the proviso in the 1938 Act: the power to lease tribal lands for *not more than ten years,* without the Secretarial involvement and competitive bidding procedures provided for in Section 2 of the Act. In this manner IRA corporations are enabled to function like other businesses to the extent of making limited leases of land, without the Secretary's participation in the *grant* of lease which would otherwise be required by the 1938 Act.

Once a lease is made, however, the authority of the Secretary to regulate operations under Section 4 applies

to *all* tribes equally. Furthermore, as authorized by the 1938 Act, most mineral leases extend beyond ten years, for "so long as the minerals are produced in paying quantities." The IRA gives *no* tribe the power to enter into long-term leases of this sort without Secretarial involvement. As a result, with respect to the bulk of mineral leases, IRA and non-IRA tribes are in exactly the same position even with respect to the requirements of Section 2 The leases at issue in *Merrion* were for longer than ten years, and the Court specifically noted that they were approved by the Secretary, as required by the 1938 Act. 455 U.S. at 135.

The legislative history of the 1938 Act also demonstrates that its purpose was to create uniformity of treatment among the various tribes, and not to establish differences among them. The legislation was proposed by the Secretary of the Interior. H.R.Rep. 1872, 75th Cong., 3rd Sess. (1938); S.Rep. No. 985, 75th Cong., 1st Sess. (1937). His letter supporting the Act noted that "Under Section 17 of that act [the IRA] Indian tribes to which charters of incorporation issue are empowered to lease their lands for periods of not more than 10 years." *Id.* However, there was no existing statutory authority for the leasing of certain other Indian lands. The letter went on: "One of the purposes of the legislation now proposed, therefore, is to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." *Id.*

There is thus no merit whatever to Petitioner's suggestion that Congress, having passed the IRA amid assurances that it would leave unaffected those tribes rejecting it, and after the deadline for voting on the IRA had passed, immediately turned around and *sub silentio* opened a vast gulf between IRA and non-IRA tribes, seriously curtailing the sovereign powers of the latter. Rather, it is plain from the language of the proviso in the 1938 Act that all Congress did thereby was to leave to IRA corporations the powers already mentioned in the IRA, to lease tribal lands for not more than ten years.

This is precisely how the Interior Department has since read the proviso in Section 2 of the 1938 Act; *i.e.* as freeing IRA corporations with appropriate charter provisions from competitive bidding requirements, but *only* in the case of leases for not more than ten years. I.D.Memo. M-36040, July 5, 1950; I.D.Memo.M-36007, July 7, 1949.[16]

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[16]Nor is anything in the Secretary's regulations to the contrary. Petitioner cites 25 C.F.R. § 211.29, which appears generally to permit the Secretary's regulations regarding mineral leases to be superseded by the terms of constitutions *or* charters adopted pursuant to the IRA, the Oklahoma Indian Welfare Act of June 26, 1936 (25 U.S.C. and Supp., §§ 501-509), or the Alaska Act of May 1, 1936 (48 U.S.C. §§ 362, 258a); as well as by tribal laws authorized thereunder. The scope of such a regulatory exemption is obviously broader than the proviso in the 1938 Act, which for example does not even mention the Oklahoma Act or the Alaska Act. Precisely for that reason, § 211.29 cannot be read as an interpretation of Congress' meaning in the proviso, but rather as representing an exercise of the Secretary's own regulatory discretion. Congress in Section 4 of the 1938 Act established that operations under all Indian mineral leases, regardless of form of tribal organization, were *subject* to Secretarial regulation. As part of the Secretary's regulatory scheme, he has specified the manner in which he will allow his general regulations to be superseded by tribes. This is consistent with the authority asserted by the Secretry to waive

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B. The Indian Mineral Leasing Act does not limit the taxing power of any tribes.

Interests in Indian trust lands cannot be conveyed except by the authority of Congress. 25 U.S.C. § 177. Before the 1938 Act was passed, there were classes of Indian land omitted from prior leasing statutes. H.R. Rep. 1872, 75th Cong., 3rd Sess. (1938); S.Rep. 985, 75th Cong., 1st Sess. (1937). The fundamental purpose of the 1938 Act Mineral Leasing Act was to enable all Indian tribes to lease their land. In order to "bring all mineral-leasing matters in harmony with the Indian Reorganization Act," *id.*, the particular leasing scheme developed was also intended to give Indians what they had not always had before, "the greatest return from their property," and "a voice in the granting of such leases." S. Rep. 985, 75th Cong., 1st Sess. at 2-3.

Claims that the purpose of the 1938 Act was to subordinate Indian management of Indian resources to Secretarial control, so that the Secretary could ensure an uninterrupted flow of minerals from Indian lands to the national markets, are completely unfounded. The Act

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or make exceptions to his regulations generally, 25 C.F.R. § 1, and with other cases where provision is made for supersession of regulations. *See e.g.* 25 C.F.R. § 11.1(e), permitting tribal ordinances to supersede the Code of Indian Offenses. It should also be noted that the purpose of regulations such as §§ 211.29 and 11.1(e) is to permit tribal law to supersede even those regulations with which they are in direct conflict. In the instant case, no "supersession" is required because the Secretary has determined that nothing in his regulations conflicts with tribal tax laws or requires his approval thereof. The very discretion reflected in § 211.29, pursuant to which the Secretary creates regulatory exemptions which the 1938 Act plainly did not require or even suggest, defeats the argument that *if* the 1938 Act permits the Secretary to regulate tribal taxation, it also compels him to do so.

was obviously unsuited to any such purpose, as it placed the most basic decision of all, whether or not to lease, in the hands of the Indian tribes. 25 U.S.C. § 396a.

The Secretary's role vis-a-vis the tribes is far more limited than Petitioner claims. Leases are granted by the tribes, not the Secretary.[17] They must be approved by the Secretary, just as Congress has elsewhere "retained the power to scrutinize the various transactions by which the Indian might be separated from [his] property." *Poafpybitty v. Skelly Oil Company,* 390 U.S. 365, 369 (1968). As the Court in *Poafpybitty* noted, such restrictions are "mere incidents of the promises made by the United States in various treaties to protect Indian land." *Id.* They are not intended to restrict tribal governmental operations.

The Interior Department has clearly conceived of its role under the 1938 Act as being the protection of tribal property, not the control of tribal government. Interior Department officials have characterized the regulations under the Act as "rock bottom protection of Indians and the Bureau of Indian Affairs against scalping by mining company officials." Bureau of Competition, Federal Trade Commission, *Staff Report on Mineral Leasing on Indian Lands* 18 (October 1975). For the Interior Department to attempt to serve any other interests than the Indians' in its regulations under the Act would in fact be of questionable legality. The reason was put very well by

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[17]Federal law does not implicitly pre-empt state taxation of federal proprietary leases; *a fortiori* it should not preclude *tribal* taxation of *tribal* leases. *United States v. Fresno,* 429 U.S. 452 (1977); *United States v. Detroit,* 355 U.S. 466, 495 (1958); *Elder v. Wood,* 208 U.S. 226 (1908); *Forbes v. Gracey,* 94 U.S. 762 (1877).

the Federal Trade Commission in its *Staff Report on Mineral Leasing on Indian Lands, supra:*

> Indian land, unlike public land, does not belong to the Federal Government to alienate or encumber as it pleases; rather, Indian land is held in trust for the Indians and the traditional legal principles of trust law are generally applicable to its disposition. Consequently, federal land use policy regarding Indian lands is much more limited in scope than that regarding public land and cannot be shaped to accord with a federal energy policy which would dictate variance from the trust responsibility. Indian land leasing is more analogous to leasing of privately owned land than to leasing of public land.

Id. at 1.

In *Poafpybitty, supra,* which involved a similar regulatory scheme, the Court rejected the argument that the "Secretary has such complete control over" mineral leases of Indian allotments that only he can sue for their breach. Although respecting the Congressional intention that the Secretary be sufficiently involved in leasing matters to protect Indians from loss of their property, the Court found that to preclude independent legal action by allottees would frustrate another Congressional purpose—to "prepare the Indians to take their places as independent, qualified members of the modern body politic." 390 U.S. at 369. The Court noted also that the BIA was not in a position to manage all Indian trust property alone. Here there is an even greater distance than in *Poafpybitty* between the area of the Secretary's involvement (regulating lessees' operations, thereby protecting tribal property), and what the Tribe seeks to do (impose a uniform tax, a governmental matter). Here too it is fully possible, by upholding the taxing power of the Tribe, to further the

Congressional policies of tribal self-government and economic development without risking the loss of tribal property which the Secretary's involvement was designed to prevent. And here too the United States cannot be, and indeed does not wish to be, the sole provider of governmental services on the reservation.

As noted above, this Court has declined to find that Congress has limited the sovereign powers of Indian tribes without "clear indications" that Congress intended such a result. See discussion at p. 10, *supra.* It is impossible to find any intention to limit tribal taxing power in the 1938 Act. This Court in *Merrion* found that even a specific authorization of state taxation should not be construed to prohibit tribal taxation. 455 U.S. at 150, construing 25 U.S.C. §398c. The 1938 Act, by contrast, does not mention taxation at all.

Petitioner proposes overturning more than a century of Indian law and applying a whole new standard in these cases—that wherever the federal government involves itself to any extent in an area of Indian affairs, tribes may no longer exercise any jurisdiction, whether or not conflicting, over the same subject matter.[18] This unprece-

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[18]There is of course an enormous difference between the standards used to determine where Congress has divested a tribe's powers, and those used to determine where the federal regulation of Indian matters has pre-empted *state* jurisdiction over *Indian* lands. *See New Mexico v. Mescalero Apache Tribe,* — U.S. —, 76 L.Ed.2d 611, 620, 103 S.Ct. 2378 (1983); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143-144 (1980). The test a state must meet in this class of cases is an especially stiff one, for exactly the same reason that the courts do *not* incline toward finding tribal powers to have been divested—*i.e.,* the Congressional policy favoring *tribal* government of Indian country. *Id.* at 142-145, *New Mexico v. Mescalero Apache*

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dented approach would wreak havoc with Congress' policy of encouraging tribal self-government, because there are virtually no aspects of tribal affairs untouched by the federal government. In order to reconcile the Congressional policy in favor of Indian self-determination with the plenary powers of Congress, the mere involvement of the federal government cannot be interpreted as ousting tribal jurisdiction. To do so would be to turn every act of Congress intended to benefit Indian tribes into an unintended diminishment of their sovereignty.

Petitioner fails to recognize the distinction between tribal proprietary and tribal governmental matters which was emphasized by this Court in *Merrion*. A lease is a conveyance of a *property* interest, and not a certificate exempting the lessee from tribal laws of general applicability. That the Indian Mineral Leasing Act was directed at tribal proprietary matters is borne out by the regulations that the Secretary has promulgated. 25 C.F.R. Part

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Tribe, supra, 76 L.Ed.2d at 620; *Ramah Navajo School Board v. New Mexico*, 458 U.S. 832, 845-847 (1982). Far from vying with one another, the federal regulatory involvement and the tribal interest in self-government have been held in these cases to erect two "independent but related" barriers to state jurisdiction. *Ramah, supra*, 73 L.Ed.2d at 1179, quoting *White Mountain, supra*.

Given that state claims to tax reservation mineral activities are clearly not as strong as the Tribe's, *see also Merrion*, 455 U.S. at 159, Petitioner's argument here would *a fortiori* relieve it from state taxation as well. Petitioner has in fact filed suit claiming that Arizona's taxes on its Navajo mineral lease improvements are pre-empted by the 1938 Act and "obstruct the Congressionally mandated power of the Navajo Tribal Council to lease Reservation property, subject to the approval of the Secretary of the Interior, in order to further Tribal development goals." *Kerr-McGee v. Red Mesa Unified School District No. 27*, (Ariz.Superior Ct., Apache Cty., No. 21-757), ¶ 25 of Complaint.

211.[19] Despite Petitioner's insistence on their breadth, the regulations provide virtually nothing that a private owner of mineral lands would not address in the terms of a lease. Like the Act, the regulations do not bear at all on the question of governmental services or the raising of revenues to support them. There is simply no inconsistency between any provision of the regulations and tribal taxation.

Consistent with their proprietary orientation, the regulations are obviously directed at the activities of lessees, and not of other entities such as tribal governments. This is what Congress called for when it provided that "All operations under any oil, gas, or other mineral lease . . . shall be subject to the rules and regulations promulgated by the Secretary of the Interior." 25 U.S.C. § 396d. Tribal taxes are not operations under a lease.

The Secretary has promulgated no regulations bearing on the tribal taxes at issue, save the guidelines confirming that they do not require his approval. *See* Appendix. This case does not call for a determination of the limits of the Secretary's regulatory authority. What is at issue here is the Secretary's determination that he need not act at all. In order to prevail, Petitioner must show not only that Congress granted the Secretary the power to control Navajo taxation, but also that

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[19]The Secretary's interpretation of the Act is entitled to great weight, especially as it was originally proposed by the Interior Department, and that agency has been responsible for implementing the legislation since its inception. *Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 408 (1961); *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 549 (1940).

he has a non-discretionary duty to exercise that power. This it cannot do. Even in those cases where a federal agency has clear authority to issue regulations pre-empting local law, no pre-emption occurs unless and until such regulations issue. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 172 (1978).

Here as elsewhere, Petitioner begins by arguing for broad Secretarial authority in Indian affairs, and ends by suggesting the Secretary has no choice but to manage those affairs in the manner favored by oil and gas producers. Neither the 1938 Act nor anything else in federal law supports this contention.

VI. Allegations About the Administration and Enforcement of the Navajo Tax Laws Are Premature and Unfounded.

This case presents only one issue for decision: whether the Navajo Tribe can levy taxes against Petitioner without Secretarial approval. Petitioner and its supporting *amici* attempt to inject into the case a grab-bag of completely speculative issues, ranging from what enforcement mechanisms the Tribe may lawfully use against Petitioner, or even against other taxpayers, when and if they become delinquent, to how taxation should be managed in the former Navajo-Hopi Joint Use Area. In addition to being outside the scope of the question presented, these matters do not even rise to the level of a case or controversy. United States Constitution, Art. III, Sec. 2. Neither this Court, the Tribe, nor anyone else can reasonably be expected to answer in advance every question which could conceivably arise in the course of an entire tax program.

None of these protestors has ever attempted to enforce any rights in tribal forums, nor have they yet had occasion to appeal any assessment of a Navajo tax.[20] The Tribe has never taken any enforcement action against any person under the tax laws. What Petitioner and the *amici* are therefore asking this Court to do is to *assume* that the Tribe will deny it due process and other rights at every turn, and to weigh this completely ungrounded assumption into its consideration of the validity of the tax.

The enforcement mechanisms about which Petitioner complains are closely modelled on those used by other governments. States routinely enjoin delinquent taxpayers from continuing in business; take liens on, seize, and sell the property of delinquent taxpayers; and even use criminal penalties to enforce their tax laws. *See e.g.* N.M.Stat.Anno. (1978) §§7-1-1—7-1-82; Ariz.Rev.Stat. §§ 42-1334, 42-1821. In specific circumstances the Tribe may seek to use these remedies as well.[21] Contrary to

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[20]The tax laws provide for assessments to be appealed to the Navajo Tax Commission and from there to the Navajo Court of Appeals. 24 Nav.Tr.Code §§ 220, 427, Jt.App. 44-45, 60-61 (§§ 234, 434 of 1984 amendments lodged with Clerk). The allegations of *amici* supporting Petitioner notwithstanding, they do not provide for further review in the Tribal Council or any other tribal forum.

[21]The tax laws do not include lease cancellation as an enforcement mechanism. They do provide in particular circumstances for sanctions extending to exclusion of individuals from all or part of the Reservation and suspension of rights to do business. *See New Mexico v. Mescalero Apache Tribe*, — U.S. —, 76 L.Ed.2d 611, 626 n.27 (1983); *Merrion*, 455 U.S. at 144. If Petitioner believes it is shielded from any particular enforcement mechanism by virtue of rights granted in its leases, it may assert that protection if and when the Tribe ever attempts to use such a mechanism against it. That issue however in no way bears on the question presented in this case: whether the Navajo Tribe can effectively levy taxes against Petitioner with-

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Petitioner's assumption, however, the tax laws do not apply only to trust land mineral leases or to non-Indian owned corporations. Their coverage extends to a variety of persons including members of the Navajo tribe, persons doing business on reservation fee land owned by the Tribe, and businesses such as construction companies which may operate on the reservation pursuant to no leases or licenses at all. The applicability of the various enforcement mechanisms to the multiplicity of taxpayers, in their diverse circumstances can only be determined on an individual basis. Moreover, detailed regulations necessary to the implementation of certain enforcement measures are still forthcoming.

Petitioner and the *amici* suggest that they have no forum whatever to determine the legality of actions the

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out Secretarial approval. *See Ohio River & Western Ry. Co. v. Dittey*, 232 U.S. 578 (1914) (Court in upholding imposition of tax will not rule on validity of penalty provisions not yet used, especially in light of severability clause in statute); *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253, 1259 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (court in upholding liability of Indian land mineral lessees for state possessory interest taxes not required to trace precise accommodations required to protect Indian owners when taxes enforced against delinquent lessees, even where state had earlier advertised sale of tribal mineral leaseholds); *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 993.

Restrictions on tribal powers imposed by federal law are of course effective whether or not specifically written into tribal ordinances. It may however be noted that the Tribe in its laws does acknowledge certain such limitations, for example that it may imprison Indians but not non-Indians for offenses such as tax fraud and bribery, and that in certain instances federal law may prevent the seizure and sale of property without the approval of the Secretary. 24 Nav.Tr.Code §§ 221, 225(f), 421, 425(f) (as amended 1984; lodged with Clerk). *See Alaska Consolidated Oil Fields v. Rains*, 54 F.2d 868 (9th Cir. 1932); *Conroy v. Conroy*, 575 F.2d 175 (8th Cir. 1978).

Tribe may take against them. They seem in this respect to ignore the existence of this very lawsuit. There is no reason to believe that if tribal officers threaten actions arguably beyond the Tribe's power under federal law, the federal courts will not hear suits for injunction just as they have done here. It is true that in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), this Court found that Congress did not intend the Indian Civil Rights Act to create a federal cause of action other than *habeas corpus*. But the oil companies ignore the rest of this Court's holding: "Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply." *Id.* at 65. The Court recognized tribal courts as "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians"[22] (as well as recognizing non-judicial tribal institutions as "competent law-applying bodies"). *Id.* Congress may change this scheme if it wishes, but as the purpose of the current arrangement is to *protect* tribal sovereignty, it is a perversion of that purpose to attempt to use it as an excuse for *limiting* tribal governmental powers. Navajo tribal courts are avail-

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[22]In specific instances other forums are also available. For example *amicus curiae* Salt River Project fails to mention that the same lease which it identifies as containing a tribal tax waiver also provides for determination of disputes thereunder by the Secretary. For that reason, and contrary to SRP's implication, nothing about the lease terms was presented for decision in the earlier litigation between the Tribe and SRP. *Salt River Project v. Navajo Tribe*, No. 78-352 (D.Ariz., July 11, 1978); *vacated as moot*, Nos. 78-3492 and 78-3028 (9th Cir. 1982). The fact that SRP was sufficiently aware of Navajo taxing powers fifteen years ago to address them in a lease (as did *amicus curiae* Arizona public service company nine years earlier still), belies its claim that *Merrion* was a "jolt" to Indian law.

able to hear claims against tribal officials based on the Indian Civil Rights Act, as well as on other law. *See, e.g.*, 24 Nav.Tr.Code § 624 (d) (1980). Neither Petitioner nor the *amici* have ever attempted to bring any such claims in tribal forums.

Petitioner as well as some of the *amici* have however commented on regulations proposed by the Navajo Tax Commission, in writing or at hearings before the Commission. There is nothing to prevent these companies from advocating their views with tribal lawmakers in the same way as they do with other governments. The lack of suffrage can be no impediment, as corporations are no more able to vote in state or federal elections than in tribal ones. Here as elsewhere corporations "vote" only to the extent that they have employees or shareholders who are citizens of the jurisdiction. *See also Barta v. Oglala Sioux*, 259 F.2d 553, 557 (8th Cir. 1958).

The only question ripe for decision is whether the Navajo Tribe can effectively levy taxes against Petitioner without the approval of the Secretary of the Interior. It is respectfully submitted that that question must be answered in the affirmative.

CONCLUSION

The power to tax is an inherent sovereign power which Congress has never divested or conditioned on Secretarial approval. It is both necessary and desirable for tribes to utilize this power. Services once provided in Indian country by federal programs using federal tax dollars are now, with the active encouragement of both Congress and the

executive branch, provided instead by tribal governments. Since this Court's decision in *Merrion*, Congress has reaffirmed its support for tribal taxation by expressly accommodating it in its own tax scheme. 26 U.S.C. § 7871(a)(3). President Reagan has reiterated in his Statement on Indian Policy that tribes should have the "primary responsibility" for meeting the needs of their citizens and that it is "important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government." Weekly Compilation of Presidential Documents, Vol. 19, no. 4, at 99 (January 31, 1983). This is precisely what the Navajo Tribe is attempting to do.

There is nothing unlawful about requiring Kerr-McGee to contribute to the support of governmental programs from which it benefits. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs
Washington, D.C. 20245

GUIDELINES

Review of Tribal Ordinances Imposing Taxes on Mineral Activities

Approved:
/s/ Ken Smith
Assistant Secretary — Indian Affairs
Jan. 18, 1983

REVIEW OF TRIBAL ORDINANCES IMPOSING TAXES ON MINERAL ACTIVITIES
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1.1 *Introduction.*

A. *Purpose.* These guidelines are intended:

(1) To implement the Area Directors' authority to review or approve tribal ordinances imposing taxes on mineral activities by suggesting a procedure by which tribes can consider interests of persons affected by their taxing ordinances, and by establishing a standard for review of such ordinances by the Area Directors; and

(2) To assist Indian tribes in the exercise of their inherent authority to tax mineral activities within their jurisdiction.

B. *Scope.* These guidelines apply to tribal ordinances which tax mineral activities where Secretarial review or

approval is expressly required by federal law, the constitution of the tribe, the ordinance itself, or other tribal law.

1.2 *Definitions.* As used in these guidelines:

A. "Area Director" means the Bureau of Indian Affairs official in charge of an Area Office who, pursuant to 209 DM 8 and 10 BIAM 3, exercises the Secretary's authority to approve or disapprove tribal ordinances, except that, with respect to the Navajo Reservation, it means the Deputy Assistant Secretary—Indian Affairs (Operations).

B. "Area Director's approval" includes an Area Director's decision not to rescind an ordinance which has been approved by the Superintendent.

C. "Area Director's disapproval" includes an Area Director's rescission of an ordinance which has been approved by the Superintendent.

D. "Indian tribe" or "tribe" means any Federally recognized Indian tribe, band, nation, pueblo or other tribal entity which has the inherent authority to tax.

E. "Minerals" includes both metalliferous and nonmetalliferous minerals and also includes sand, gravel, pumice, cinders, granite, building stone, limestone, clay, and silt.

F. "Secretary" means the Secretary of the Interior or his authorized representative.

G. "Superintendent" means the Bureau of Indian Affairs official in charge of an agency office except that, with respect to the Navajo Reservation, it means the Navajo Area Director.

H. "Tax on mineral activities" means a tax imposed:

(1) Upon the production of minerals;

(2) Upon the proceeds from production of minerals; or

(3) Upon an interest of a person or entity engaged in the production and or transportation of minerals when that interest is directly related to the production and or transportation of minerals.

I. "Tribal ordinance" or "ordinance" means a tribal legislative enactment in the form of either a resolution or an ordinance.

1.3 *Procedures Precedent to Enactment of Ordinance.*

A. *Tribe's Notice to Superintendent.* The Area Director shall not approve a tribal ordinance subject to these guidelines unless, prior to enactment, the tribe has given the Superintendent at least forty-five (45) days notice, in writing, of intent to enact the ordinance.

B. *Superintendent's Notice to Public.* The Superintendent will give thirty (30) days notice to the public of the tribe's intent to enact the ordinance. The Superintendent's notice will be posted at public places on the reservation and published in the local tribal newspaper, if any, a newspaper of general circulation in each state in which the tribe's reservation is located, and the newspaper for legal notice designated by each county in which the tribe's reservation is located. The notice will state where a copy of the proposed ordinance and the tribal constitution, if any, may be inspected. It will invite the public to submit written statements to the tribe and advise commenters to send copies of their statements to the Superintendent at the same time they submit the statements to the tribe.

C. *Hearing.* Prior to enacting an ordinance, a tribe may hold a public hearing if it deems it advisable.

D. *Pre-Enactment Considerations by Tribe.* Prior to enacting an ordinance, a tribe may want to consider (1) the effect of the proposed tax upon mineral production on the tribe's reservation, (2) the effect of the tax, if any, upon individual Indian owners of minerals, title to which is held in trust by the United States or which is subject to a federal restriction against alienation, (3) the economic effect of the tax upon consumers and (4) the revenues that will be provided to the tribe by the tax.

E. *Required Submissions to Superintendent.* The Area Director shall not approve an ordinance subject to these guidelines unless the tribe has submitted to the Superintendent: (1) a written notice of intent to enact the ordinance as required by subsection 1.3A, (2) a verbatim transcript of any public hearing held, and (3) other documents, if any, which the tribe believes will aid in review.

1.4 *Review Procedure: Superintendent.*

A. *Tribal Constitutional Requirements.* The Superintendent will review the ordinance in accordance with the review authority and time limits, if any, provided for the Superintendent's action in the tribal constitution.

B. *Approval by Superintendent.* If the Superintendent approves the ordinance pursuant to authority granted in the tribal constitution, he/she will forward the ordinance, the verbatim transcript of any public hearing held by the tribe, any other documents submitted by the tribe,

a copy of the published or posted notice, and the copies of statements received from the public, to the Area Director as soon as possible but not later than five (5) days after he/she approves the ordinance. The Superintendent will notify persons who have submitted copies of statements to him/her (1) that the Superintendent has approved the ordinance, (2) that the ordinance and the statements have been forwarded to the Area Director and (3) that commenters may make additional comments to the Area Director provided they furnish a copy of the additional comments to the tribe.

C. *Disapproval by Superintendent.* If the Superintendent disapproves the ordinance pursuant to authority granted in the tribal constitution, he/she will return the ordinance to the tribe in accordance with the provisions of the tribal constitution. If authorized by the tribal constitution to disapprove a tribal ordinance, the Superintendent will disapprove the ordinance if the tribe has failed to comply with the requirements of subsections 1.3A and E. The Superintendent's disapproval under this section does not preclude the tribe from appealing the disapproval to the Area Director in accordance with the provisions of the tribal constitution.

D. *Transmittal by Superintendent Who Is Not Given Approval Authority in Tribal Constitution.* If the Superintendent has not been granted authority by the tribal constitution to approve or disapprove the ordinance, he/she will forward the ordinance, the verbatim transcript of any public hearing held by the tribe, any other documents submitted by the tribe, a copy of the published or posted notice, and the copies of statements received from

the public to the Area Director as soon as possible but not later than ten (10) days after he/she receives the ordinance. The Superintendent will notify persons who have submitted copies of statements to him/her (1) that the ordinance and the statements have been forwarded to the Area Director and (2) that commenters may make additional comments to the Area Director provided they furnish a copy of the additional comments to the tribe.

1.5 *Review Procedure: Area Director.*

A. *Pre-Approval Meeting.* If the tribe or an affected taxpayer who submits comments on the tribal tax ordinance requests a meeting with the Area Director on the ordinance, prior to his decision to approve or disapprove the ordinance, the Area Director shall hold such a meeting. If the tribe requests such a meeting, the Area Director shall inform the affected taxpayers who had submitted comments of the meeting and allow such taxpayers to participate in the meeting. If an affected taxpayer who has submitted comments requests such a meeting, the Area Director shall inform the tribe and the other affected taxpayers who have submitted comments of the meeting and allow the tribe and such taxpayers to participate in the meeting. At the meeting the tribe and the taxpayers may submit any testimony related to the ordinance which they deem relevant. An adequate record of the meeting shall be made either in writing or by machine transcription. This record shall be made a part of the record upon which the Area Director relies to make his decision to approve or disapprove the ordinance.

B. *Record for Review.* The Area Director will base his review on:

(1) The ordinance;

(2) Documents submitted by the tribe pursuant to subsection 1.3E;

(3) Copies of written statements submitted to the Superintendent pursuant to subsection 1.3A;

(4) Written statements submitted to the Area Director pursuant to subsection 1.4B or D;

(5) Testimony at any meeting held by the Area Director pursuant to subsection 1.5A.

Review of the ordinance will be completed within the time limits, if any, in the tribal constitution. In the case of tribes without time limits in their constitution, review will be completed within ninety (90) days of receipt of the ordinance by the Area Director.

C. *Notice of Approval.* The Area Director will notify the tribe in writing of his approval or disapproval of the ordinance and will publish notice of approval of the ordinance in the local tribal newspaper, if any, a newspaper of general circulation in each state in which the tribe's reservation is located, and the newspaper for legal notice designated by each county in which the tribe's reservation is located. The Area Director in approving or disapproving a tribal tax ordinance shall set forth his reasons for such approval or disapproval, including a brief response to any testimony given by the tribe or affected taxpayers at a meeting held pursuant to subsection 1.5A, and furnish a written copy of such response to the tribe and all affected taxpayers who attended the meeting.

1.6 *Standard of Review.*

A. *Area Director's Approval.* The Secretary will approve a tribal ordinance subject to these guidelines un-

less he finds that one or more of the grounds for disapproval listed in paragraph (B) of this section exist with respect to the ordinance.

B. *Grounds for Area Director's Disapproval.* The Secretary will disapprove a tribal ordinance subject to these guidelines if he finds that:

(1) The tribe has failed to comply with the requirements of subsections 1.3A or E.

(2) The ordinance was enacted by a tribal governing body to which the tribe's constitution, if the tribe has a constitution, has not delegated the power to impose the tax.

(a) If the tribe has a constitution, the power to impose the tax will be considered delegated to the governing body if the power to tax is expressly delegated in the constitution, or if the constitution contains a general delegation of all inherent powers of the tribe to the governing body. It will not be considered delegated if the constitution vests specfic powers in the governing body and those specific powers do not include the power to tax.

(b) Unless their powers are specifically limited by the tribal documents which established them, the governing bodies of tribes without written constitutions will be considered to possess the authority to exercise the inherent power of the tribe to tax;

(3) The ordinance does not provide a procedure, in the ordinance itself or by reference to other tribal law, by which a taxpayer may contest his or her tax liability, and be afforded a right to a hearing before a tribal forum other than the body which enacted the tax; or

(4) The ordinance violates federal or tribal law.

1.7. *Appeals.* Approval or disapproval of an ordinance may be appealed pursuant to 25 CFR Part 2. However, the Secretary may not approve or disapprove an ordinance outside the time limits, if any, in a tribal constitution. Nothing in these guidelines precludes a tribe from amending a disapproved ordinance to cure the grounds for disapproval and resubmitting the amended ordinance for review in accordance with these guidelines.

1.8. *Review of Amendment to Ordinance.* An amendment to a previously-approved tribal ordinance imposing taxes on mineral activities is subject to these guidelines if it effects a change in the rate of taxation, the basis of taxation, or the class of persons or entities subject to the tax. An amendment which does not effect a change in the rate of taxation, the basis of taxation, or the class of persons or entities subject to the tax is not subject to these guidelines but remains subject to the review or approval procedures specified in the tribal constitution, the ordinance itself, or other tribal law.

For purposes of this section, a change in the basis of taxation means a change in the base subject to the tax that would substantially affect the tax liability of the taxpayer. Examples of a change in the basis of taxation include (1) change from a tax on net proceeds to a tax on gross proceeds, (2) removal of deductions and/or exemptions contained in a tax, and (3) change in the method of establishing value, *e.g.*, from 50% of fair market value to 100% of fair market value.

1.9. *Amendment of Guidelines.* These guidelines shall not be amended except as follows:

A. *Notice and Comment.* Sixty (60) days prior to issuing the amendment to the guidelines, the Secretary shall publish in the Federal Register a notice of such amendment together with the text of the proposed amendment and provide the public, in such notice, with at least thirty (30) days to comment on such amendment; and

B. *Publication of Amendment.* Concurrent with issuing the amendment to the guidelines the Secretary shall publish a notice in the Federal Register of such amendment, together with a short statement of the Secretary's reasons for making such amendment and a response to any public comments.